No. 83-342

In The

Supreme Court of the United States

October Term, 1983

ROBERT H. WALDSCHMIDT, TRUSTEE,

Cross-Petitioner,

vs.

RANIER & ASSOCIATES, HARRY H. RANIER, ALGIN H. NOLAN, LIBERTY NATIONAL LEASING COMPANY, AND FIRST SECURITY NATIONAL BANK OF LEXINGTON,

Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Sixth Circuit, in affirming the opinion of the United States District Court For The Middle District Of Tennessee in which it was held that the September 20, 1978 sale and leaseback of equipment involving Fulghum Construction Corporation and Ranier & Associates, decided a federal question in a way which conflicts with applicable decisions of this court.

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On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

Ranier & Associates, Harry H. Ranier, and Algin H. Nolan (who hereinafter may be collectively referred to as "Ranier & Associates") hereby submit the following brief in opposition to the Cross-Petition For A Writ Of Certiorari filed by Robert H. Waldschmidt, Trustee (who hereinafter may be referred to as "the Trustee").

STATEMENT OF THE CASE

Although the statement of the case in the Trustee's Cross-Petition contains an accurate and complete proce-

dural history of this matter relative to the question presented, it is not an entirely accurate or sufficiently complete statement of the facts which were either specifically found by the United States Bankruptcy Court For The Middle District Of Tennessee and the United States District Court For The Middle District Of Tennessee, or were otherwise established in the record. The following are the facts that are relevant to the question presented or were otherwise mentioned in the Trustee's Statement of the C[illegible] with references, where appropriate, to the opinions of the bankruptcy court and district court as reproduced in the Appendix to the Trustee's Cross-Petition:

Fulghum Construction Corporation was incorporated in Texas in 1966, and at all relevant times was qualified to do pipeline construction work in 32 states and Canada. (App. pp. 12a, 38a-39a.) Ranier & Associates was a Kentucky general partnership located in Mount Sterling, Kentucky, consisting of Harry Ranier and Algin Nolan. (App. pp. 13a, 39a.) The partnership was formed in February 1978, and since that time has owned real estate and stock in various companies, operated an equipment leasing business and provided, on a fee basis, management, accounting, advisory, financial and other professional services primarily to companies in which it or the Harry Ranier family had an interest.

Prior to October 1977, Fulghum Construction Corporation's shareholders and principal officers were James Fulghum and J. B. Miller. In October 1977, all of the common stock of Fulghum Construction Corporation was purchased by Harry Ranier and a cousin. Subsequently, Ranier & Associates succeeded to 100% ownership of the stock. (App. pp. 13a, 39a.)

While Fulghum Construction Corporation had a substantial history in construction work and owned a large amount of equipment, losses experienced through 1977, prior to its acquisition by Ranier & Associates, caused a need for additional operating capital. (App. p. 21a.) The shortage of capital was due in part to a misappropriation of approximately $194,000 by Messrs. Fulghum and Miller, two of the Trustee's witnesses at trial, for which their employment was terminated in July 1978. (App. pp. 13a, 39a.) As of September 1978, the operations of Fulghum Construction Corporation were at a stand-still and no jobs were in progress. The company needed to improve its balance sheet and liquidity of assets, while insuring the availability of equipment on an as-needed basis, to enable the corporation to obtain the bonding required to acquire jobs, get back on bid lists of prospective clients and have the funds and equipment needed during the progress of jobs.

During the last half of 1978, efforts were made by Ranier & Associates to improve the financial condition of the company. (App. pp. 49a-50a.) In early September, Harry Ranier contributed capital to the corporation (mostly equipment) in the amount of $188,000, which increased the net worth of the company. Michael Leatherman was hired as an expert to solicit work and get Fulghum Construction Corporation back on bid lists across the country. (App. pp. 13a-14a, 40a.)

In September 1978, pursuant to broad authority given to Algin Nolan in July 1978 by the Board of Directors of Fulghum Construction Corporation, action was taken relative to the corporation's equipment, which was located in various parts of the United States. (App. pp. 13a-14a,

39a-44a.) Agreements were entered into pursuant to which Ranier & Associates purchased from and leased back to Fulghum Construction Corporation all of the corporation's equipment. The equipment was appraised at its fair market value of $1,137,350 and Ranier & Associates issued a check to Fulghum Construction Corporation for that amount. Documentation evidencing the sale and a leaseback was negotiated and executed by Jim Gray (the Treasurer for Fulghum Construction Corporation) and Leatherman on behalf of Fulghum Construction Corporation, and Nolan on behalf of Ranier & Associates. While the document evidencing the sale did not contain technical conveyance language, the documentation as a whole evidenced the intention of the parties, which, as Gray, Leatherman and Nolan all testified at trial, was to sell the equipment to Ranier & Associates and have Fulghum Construction Corporation lease it back. (App. pp. 14a, 40a, 56a.) After the transaction, Fulghum Construction Corporation's books and records, including audit reports, reflected the transaction and the corporation no longer represented to creditors that it owned the equipment. (App. pp. 15a, 42a.) Beginning in May 1979, as it commenced use of the equipment on its jobs, Fulghum Construction Corporation made rental payments to Ranier & Associates relative to the equipment. The leaseback agreement provided that Fulghum Construction Corporation would pay rental only for the time during which the equipment was actually being used. These monthly rental payments were subsequently reduced by agreement of Ranier & Associates in order to aid in the efforts to make Fulghum Construction Corporation a profitable concern.

A small percentage, based on total value of the equipment sold and leased back, consisted of on-the-road ve-

hicles which had Tennessee Certificates of Title. Gray and Nolan decided not to transfer those certificates from the corporation to Ranier & Associates. (App. pp. 14a, 40a-41a.)

Simultaneous with the sale closing, Ranier & Associates granted a security interest in the equipment to Liberty National Leasing Company, from which it had borrowed a portion of the purchase proceeds. (App. pp. 14a-16a, 41a-42a.) Later, First Security National Bank obtained a second lien on the equipment through Ranier & Associates to secure other indebtedness of Ranier & Associates. (App. pp. 17a, 43a.)

While, other than the broad authority granted to Nolan in July 1978, there was no formal, prior action taken by the shareholders or directors of Fulghum Construction Corporation relating specifically to the sale/leaseback, Ranier and Nolan (as Ranier & Associates, the sole shareholder at the time of the transaction and members of the Board of Directors of the corporation) met and approved the sale and leaseback and participated directly in the transaction. (App. p. 20a.) The record shows that all of the corporate board members, with the possible exception of one, were aware of, approved of, or took direct part in the negotiation, consummation and implementation of the transaction. Also, on May 21, 1980, the Board of Directors and the sole shareholder took formal action ratifying not only this transaction, but all transactions carried on by the officers and directors of Fulghum Construction Corporation since September 20, 1978.

A portion of the proceeds of the sale was used by Fulghum Construction Corporation to pay off its debts

secured by the equipment owing to Commerce Union Bank in Nashville and United American Bank. In addition, part of the proceeds went to purchase a $200,000 certificate of deposit at United American Bank, which was used to obtain, and later pay off, a loan for operating capital to the company at United American Bank. The remaining $187,350 of sale proceeds were, at the time of the sale/leaseback, immediately loaned back to Ranier & Associates. A promissory note was executed by Ranier & Associates to the corporation to evidence this withdrawal, and it was subsequently repaid as funds were returned to Fulghum Construction Corporation on an as-needed basis by Ranier & Associates during the spring of 1979. (App. pp. 15a, 41a, 53a.)

Financial statements were prepared by an independent public accounting firm which examined the September 1978 transaction for Fulghum Construction Corporation. The accountants determined that it was a bona fide sale and leaseback transaction and that the company realized a substantial influx of cash and increase of net worth of $648,743 which was not taxed because of a tax-loss carryforward. The financial statements indicated that, after the transaction, Fulghum Construction Corporation's assets exceeded its liabilities by $170,928. (App. pp. 15a-16a, 41a.)

As a result of Fulghum Construction Corporation's improved financial condition, the officers and directors determined that it was in a position to obtain the financing necessary to acquire and complete jobs. It was decided that relatively small jobs would be sought and that, in order to enhance the company's chances to obtain other

pipeline construction contracts, jobs would be bid at less than the normal percentage of profit. A loan commitment necessary to fund any new jobs was obtained by Nolan from United American Bank.

By May of 1979, Fulghum Construction Corporation had obtained four jobs, which required additional equipment and substantial cash. In May and June of 1979, Ranier & Associates purchased additional equipment from third parties and leased it to Fulghum Construction Corporation. Nolan took projections of the cash needs of the corporation and called upon United American Bank to fund the jobs under its previous loan commitment. However, he was informed that the officer who had committed to the loan had left the bank and United American would not honor the commitment. Nolan sought other financing for the corporation from other institutions, but was turned down due to its lack of earnings history and, by Kentucky banks, because it was an out-of-state corporation. Thereafter, by borrowing funds in the name of Ranier & Associates, Nolan obtained $400,000 operating funds for Fulghum Construction Corporation from United American Bank. An additional $450,000 was loaned to Fulghum Construction Corporation by Ranier & Associates.

During the progress of the jobs, it was recognized that if timely payroll payments were not made, the jobs would stop. (App. pp. 17a, 43a.) Thus, since the periodic payments from the pipeline companies for which Fulghum Construction Corporation was doing work were often late, but the payroll had to be met on a timely basis, Ranier & Associates became involved in bridging the short-term

cash flow requirements of the company. When funds were required, Nolan conferred with officers of Fulghum Construction Corporation as to the job-cost projections and anticipated profit and cash receipts. When there were sufficient receivables projected to come to Fulghum Construction Corporation to cover particular funding requirements, Ranier & Associates would advance the funds to cover the corporation's checks. Both Nolan and Gray testified that these were temporary advances and not capital contributions. Some of these advances were repaid to Ranier & Associates as the specifically anticipated job payments were received by Fulghum Construction Corporation. This practice continued throughout the progress of the four jobs. Detailed, independent records of these transactions were kept by Fulghum Construction Corporation and Ranier & Associates, with a complete record being made an exhibit at the trial. (App. pp. 16a, 42a, 50a.) (These transactions are the subject of the preference action concerning which the Petition for a Writ of Certiorari by Ranier & Associates has been filed.) As a result of Nolan's efforts in obtaining financing for Fulghum Construction Corporation and providing temporary funding, the corporation was able to complete the four jobs.

Throughout the course of the jobs, the last of which ended in late 1979, Nolan received from Gray periodic reports and projections relative to the jobs. Until November 1979, these projections showed profits in all four jobs when considered in the aggregate. Then in November 1979, Gray informed Nolan of additional liabilities totaling $605,000 and, about this time, Nolan also became aware that the corporation had been incurring a substantial with-

holding tax liability. This knowledge caused Ranier & Associates to decide to shut down the operations of the company, and the involuntary bankruptcy petition followed in January 1980.

The amounts advanced to Fulghum Construction Corporation by Ranier & Associates exceeded the amounts paid by Fulghum Construction Corporation to Ranier & Associates by over $387,000. (App. pp. 16a-17a, 42a-43a.)

REASONS FOR DENYING THE CROSS-PETITION

The decision of the sixth circuit in affirming the district court's holding that the September 20, 1978 sale/leaseback transaction between Fulghum Construction Corporation and Ranier & Associates could not be voided by the Trustee is not in conflict with this court's holding in *Pepper v. Litton*, 308 U. S. 295 (1939), and the Trustee's Cross-Petition should therefore be denied.

The Trustee is apparently basing the Cross-Petition on the contention that the decision to uphold the sale/leaseback transaction conflicts with *Pepper, supra*, because Ranier & Associates breached its fiduciary duty to the corporation and its creditors and the transaction was not formally authorized by the corporation.[1] (Trustee's Cross-

[1] Although some reference is made in the "Questions For Review" and "Rulings Of The Courts Below" sections of the Trustee's Cross-Petition to other contentions or issues which were raised in the lower courts, no reference is made to these in the "Issue Presented" and "Reasons For Allowance Of Writ" sections of the Cross-Petition. Therefore, there

(Continued on next page)

Petition p. 13.) As discussed below, this contention is without merit.

Concerning the argument relative to the breach of fiduciary duty, it should initially be noted that *Pepper, supra,* has somewhat questionable applicability to this case. The Trustee is apparently proceeding under § 544 (b) of the Bankruptcy Code. (See p. 3 of Trustee's Cross-Petition.) It is important to remember that a Trustee's powers under that provision are not unlimited. *In Re Skipwith,* 3 C. B. C. 2d 867 (Bank. Ct., SD Calif. 1981); 4 *Collier On Bankruptcy* § 544.03 (15th ed. 1981). He is only entitled to void a transfer of property or an obligation of a debtor that is voidable under applicable law by an actual creditor. *Id.* The usual context in which the power is used is where the trustee attempts to void a transfer pursuant to the applicable state's law of fraudulent conveyances. *Id.* However, the Trustee in this case is apparently asserting that regardless of his limited powers, he can have the transaction declared void on "equitable principles," relying on the doctrines established in *Pepper, supra.* However, *Pepper, supra,* did not involve the avoidance of a sale in order to bring assets back into the estate, but rather involved the doctrine of equitable subordination of a claim in bankruptcy and a fact situation in which the controlling shareholder in a "one-man

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will be no discussion of those contentions or issues in this brief. In any event, those contentions or issues were thoroughly briefed in, and decided adversely to the Trustee by, the lower courts (App. pp. 17a-21a, 50a-56a), and present no valid reason under Rule 17 of the U. S. Supreme Court Rules for granting the Cross-Petition.

corporation" was involved in a "scheme to defraud" a particular creditor with a judgment against the corporation "reminiscent of the evils with which 13 Eliz. chap. 5, was designed to cope." 308 U. S. at 296-97. The proof showed and the lower courts in this case determined that the sale/leaseback transaction was not a fraudulent conveyance and the Trustee cannot circumvent those facts and findings simply by relying upon *Pepper, supra.*

In addition, it should further be noted that the courts, even in the context of the equitable subordination of claims, have not applied the principles espoused in *Pepper, supra,* in an unlimited fashion. As the fifth circuit stated in *Matter of Mobile Steel Co.*, 563 F. 2d 692 (5th Cir. 1977):

> The prerogative to relegate claims to inferior status on equitable grounds, though broad, is not unlimited. It confronts two principal bounds. First, equitable considerations can justify only the subordination of claims, not their disallowance. . . .
>
> Second, three conditions must be satisfied before exercise of the power of equitable subordination is appropriate. (i) The claimant must have engaged in some type of inequitable conduct.
>
> (ii) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.
>
> (iii) Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.
>
> 563 F. 2d at 699-700 (citations omitted.)

Likewise, the eighth circuit has stated as follows:

> This power of subordination must be soundly exercised and it should not operate to take away any

rights punitively to which a creditor is justly entitled and thus give it to other creditors who have no fair right to it. *Kansas City Journal-Post* requires either "fraud or inequity" as the proper basis for subordination. Again, this Court in *Kenneally v. Standard Electronics Corporation*, 364 F. 2d 642 (8th Cir. 1966), held that the secured claim of a creditor, which had effective control of the bankrupt corporation, should not be subordinated since there was no evidence of actual fraud or unfairness. In other words "fraud or unfairness" (unfairness is equated with inequity) is essential for a decision to subordinate.

Farmers Bank of Clinton, Missouri v. Julian, 383 F. 2d 314, 323 (8th Cir. 1967).

However, in any event, the district court in this case examined the sale/leaseback transaction under the principles of *Pepper, supra*, and still concluded that the transaction was not voidable:

. . . The trustee argues that Ranier & Associates breached a fiduciary duty to the creditors of Fulghum Construction Company in authorizing and performing the sale of equipment. This Court agrees with the trustee that the controlling shareholder—and in this case the sole shareholder—of a corporation maintains a fiduciary obligation to not only the minority shareholders, but also the creditors of the corporation. *See Pepper v. Litton*, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281 (1939). This Court also agrees with the trustee that a transaction between a controlling shareholder and a corporation, such as the one in question here, is to be given a higher degree of scrutiny than other contracts. *See* 13 W. Fletcher, Cyclopedia of the Law of Private Corporation, §§ 5834, 5837 (rev. ed. 1970). Examining the equipment sale transaction with even this higher degree of scrutiny, however, this Court still concludes that Ranier & Associates did not breach its duty to the creditors.

> The Trustee argues that by selling the equipment Ranier & Associates deprived Fulghum Construction Company of valuable assets that would have enabled the company to secure capital under supposedly better conditions than the outright sale provided. This argument is not supported by the facts. Fulghum Construction Company was in dire financial condition at the time Ranier & Associates acquired it. Because of its poor financial position the company was in need of a large infusion of capital. A feasible approach to secure this capital was to have Ranier & Associates acquire financing for the company, and this it did by granting to the defendant lending institutions a security interest in the equipment. Although Ranier & Associates did gain some benefit from the sale, the facts are simply not sufficient to support a finding that the end result was so detrimental to the company that Ranier & Associates somehow breached its fiduciary obligation to either the company or the company's creditors.
>
> For the above reasons, this Court agrees with the Bankruptcy Court that the trustee has no interest in the equipment. The conclusion of the Bankruptcy Court is affirmed.
>
> (App. p. 21a.)

The district court's holding is amply supported by the facts. As set out in the Statement of the Case in this brief, Fulghum Construction Corporation did benefit financially from the sale. It is patently absurd for the Trustee to argue that the corporation got no benefit from the proceeds where it was clearly established that a check for the proceeds was paid to the corporation. It was shown that the corporation, as a result of receiving the proceeds, was able to pay off a substantial amount of indebtedness owing by the corporation and to purchase a certificate of deposit which was later used to obtain and pay off a loan

for operating capital. Although approximately $187,000 of the proceeds was immediately loaned back to Ranier & Associates, it was established that the company received the benefit of this money as it was paid back to the corporation as needed during 1979. Concerning the dissipation of the tax-loss carry-forward, although the bankruptcy court found that this was a detriment to the corporation, there was no finding or proof that the "loss" of the tax-loss carry-forward resulted in any damage to the corporation or any of its creditors. Rather, it prevented any tax liability on the sizeable gain and influx of cash resulting from the sale/leaseback.

In light of these facts, it cannot be said that the transaction did not meet the requirement of fairness or adequacy of consideration referred to in *Pepper, supra,* and the Texas cases set out in the Trustee's Cross-Petition. *See e. g., Dowdle v. Texas American Oil Company,* 503 S. W. 2d 647, 651 (Tex. Civ. App. 1973), and *Crook v. Williams Drug Company, Inc.,* 558 S. W. 2d 500, 505-06 (Tex. Civ. App. 1977).

The argument concerning the lack of formal authorization is likewise unfounded. There is nothing in *Pepper, supra,* which requires that a formal resolution be passed by the shareholders or Board of Directors of a corporation before a sale of corporate assets takes place. Any such requirement and the effect of non-compliance is governed by the applicable state law which, in this case, clearly indicates that there is no basis for voiding the sale/leaseback on that basis.

Initially, it should be noted that the Trustee has limited or no standing to attack a sale of assets of a corporation on the ground that there was no formal authorization

by shareholders pursuant to state statutes. In *Royal Indemnity Co. v. American Bond & Mortgage Co.*, 289 U. S. 165 (1933), this court held that creditors have no standing to attack an adjudication in bankruptcy on the ground that the bankruptcy petition was filed by the directors of the bankrupt, without approval of the shareholders, where a state statute forbids a transfer of assets of the corporation without shareholders' assent. The court reasoned as follows:

> Statutes such as the one relied on are intended for the protection of stockholders and have nothing to do with the interests or rights of creditors. . . . The question is purely one of internal management of the corporation. Creditors have no standing to plead statutory requirements not intended for their protection. If the stockholders' rights have been infringed, and they chose to waive them, a creditor could not assert them in opposing an adjudication.
>
> 289 U. S. at 171.

The first circuit in *Greene v. Reconstruction Finance Corporation*, 100 F. 2d 34 (1st Cir. 1938), followed the holding in *Royal Indemnity Co., supra*, in holding that a bankruptcy trustee, as a representative of the corporation as well as the creditors, could not question the validity of mortgages executed by the corporation on the ground that there was no vote of shareholders of the corporation prior to the execution of the mortgages as required by Delaware statute.[2]

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[2] An apparently contrary decision on this point appears in *In Re Paul Delaney Co.*, 26 F. 2d 937 (W. D. N. Y. 1928). However, the validity of the decision is in doubt in light of the *Royal Indemnity Co.* decision, and the New York court refused to invalidate the mortgage, reasoning that the filing of a written consent by the shareholders was not indispensible and ruling that the record (as in this case) showed ratification by the shareholders.

State courts, including those of Texas, have also indicated that a creditor has no standing to attack a sale of the assets of a corporation, unless the creditor was in existence at the time of the transaction, and then only if the transaction rendered the corporation insolvent and prejudiced the creditor. *Sutton v. Reagan & Gee,* 405 S. W. 2d 828 (Tex. Civ. App. 1966); *Forrest v. Guardian Loan & Trust Co.,* 230 S. W. 2d 273 (Tex. Civ. App. 1950); *Tweedie Footwear Corp. v. Fonville,* 115 S. W. 2d 421 (Tex. Civ. App. 1938); *Zorn v. Brooks,* 83 S. W. 2d 919 (Tex. Comm. App. 1935); *Fishkin v. Hi-Acres, Inc.,* 462 Pa. 309, 341 A. 2d 95 (1975); *Still v. Travelers Indemnity Co.,* 374 S. W. 2d 95 (Mo. 1963); *Fletcher Cyc. Corp.* (Perm. ed.), § 2949.8. Therefore, even assuming a lack of the requisite authorization by the shareholders of Fulghum Construction Corporation, the Trustee, standing in the shoes of the creditor, cannot invalidate the sale under Texas law. As indicated previously in this brief, under § 544(b) of the Bankruptcy Code, the trustee can only stand in the shoes of an actual proven creditor. Therefore, since there is no proof in the record as to the existence of any actual creditor at the time of the sale in question who was prejudiced by the sale or the lack of formal shareholder approval prior to the sale, the Trustee cannot void the sale on behalf of any creditor. The reasoning of the bankruptcy court on this issue was correct. (App. pp. 53a-55a.)

In any event, the record shows that there was sufficient shareholder approval of the transaction. Both the bankruptcy court and district court specifically found that in July 1978 the shareholders passed a resolution authorizing Nolan to take broad actions on behalf of the com-

pany (App. pp. 13a-14a, 39a-40a.) Ranier & Associates, which subsequently became the sole shareholder, authorized, though not by formal resolution, and participated, in the sale. This informal authorization is sufficient compliance with the Texas statute requiring shareholder authorization of a sale of assets. *Sutton, supra; Zorn, supra; In Re Robin Bros. Bakeries,* 22 F. Supp. 662 (ND Ill. 1937). The district court was correct in concluding on this point that "[t]o accept the trustee's position would be to defy common sense." (App. p. 20a.) In addition, on May 21, 1980, Ranier & Associates, as sole shareholder, expressly and formally ratified the transaction.

The Trustee stands in no better stead in the shoes of the corporation. Clearly, Fulghum Construction Corporation, through the actions of the members of the Board of Directors and the sole shareholder in the negotiation and consummation of the sale, consented to, and is estopped from objecting to, the transaction, and the fact that no formal authorization specifically relating to the sale/leaseback transaction was given prior to the sale does not vitiate this consent. *Zorn, supra; Sutton, supra; In Re Robin Bros. Bakeries, supra; Greene, supra; Fletcher Cyc. Corp.* (Perm. ed.), § 2949.9. In addition, there is no proof that Fulghum Construction Corporation ever indicated disapproval of the transaction and, in fact, it made use of the proceeds of the sale and used and paid rental for the equipment pursuant to the lease arrangement. The corporation acquiesced in and received the benefit from the transaction and subsequently ratified the transaction, all of which constitutes approval and ratification of the sale which would bar the Trustee, standing in the shoes of the corporation, from challenging the sale.

Canion v. Texas Cycle Supply, Inc., 537 S. W. 2d 510 (Tex. Civ. App. 1976); *Pruitt v. Westbrook*, 11 S. W. 2d 562 (Tex. Civ. App. 1928); *Almar-York Co. v. Fort Worth National Bank*, 374 S. W. 2d 940 (Tex. Civ. App. 1964); *Petroleum Anchor Equipment, Inc. v. Tyra*, 410 S. W. 2d 238 (Tex. Civ. App. 1966); *Fletcher Cyc. Corp.* (Perm. ed.), § 762 at 1074.

The decision of the sixth circuit and the lower courts relative to the sale/leaseback is entirely consistent with *Pepper, supra*, as well as the other decisions of this court to which reference has been made in this brief.

CONCLUSION

The Trustee's Cross-Petition for a Writ of Certiorari should be denied.

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